



FILED

Sep 22 2008, 9:34 am

Kevin L. Smith

CLERK
of the supreme court,
court of appeals and
tax court

ATTORNEYS FOR APPELLEE:

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**IN THE
COURT OF APPEALS OF INDIANA**

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No. 20A05-0805-CR-296

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Myron L. Grubowski (Grubowski), appeals his conviction for operating a vehicle while intoxicated, a Class C misdemeanor, Ind. Code § 9-30-5-2(a).

We reverse.

ISSUE

Grubowski raises two issues on appeal, one of which we find dispositive and restate as: Whether the trial court properly denied his motion to dismiss pursuant to Indiana Criminal Rule 4.

FACTS AND PROCEDURAL HISTORY

At approximately 9:20 p.m. on April 11, 2006, Officer Scott Garvey (Officer Garvey) of the Elkhart City Police Department was dispatched to a traffic accident just off the toll road exit at Cassopolis Street in Elkhart, Indiana. When he arrived, Officer Garvey noticed two cars involved in an accident and people standing outside the vehicles. A person who claimed to be a witness directed him to the driver of one of the vehicles and told the Officer that this driver appeared to be intoxicated. Using their driver's licenses, Officer Garvey identified the people at the scene. One of the individuals handed Officer Garvey a license that was issued to Grubowski by the State of Oklahoma and admitted that he was the driver of one of the vehicles involved in the accident. Grubowski matched the photograph on the driver's license, as well as other identifying information displayed on the license.

After checking Grubowski's license, Officer Garvey detected the smell of alcohol on Grubowski's breath. He also noticed that Grubowski's speech was slurred, his eyes were red

and glossy, and he had trouble maintaining his balance. Based on these observations, Officer Garvey administered a field sobriety test. Grubowski failed the horizontal gaze nystagmus test, the one leg standing count, and the nine-step walk and turn.

On April 13, 2006, the State filed an Information, charging Grubowski with operating while intoxicated, a Class C misdemeanor, I.C. § 9-30-5-2(a) in the Elkhart City Court (City Court). On April 24, 2006, Grubowski failed to appear and the City Court issued a warrant for his arrest. On May 3, 2006, the City Court set this matter for trial on July 31, 2006. On July 17, 2006, current defense counsel filed his appearance and a demand for jury trial. Pursuant to Elkhart County Local Rules, this cause was transferred from City Court to the Elkhart Superior Court (trial court).

On August 11, 2006, the trial court convened for a pre-trial conference for which neither Grubowski nor his counsel appeared. The trial court later found that counsel had not received notice of this pre-trial conference. On February 6, 2007, the State filed a motion requesting a trial setting pursuant to Indiana Criminal Rule 4. On February 15, 2007, the trial court set this cause for trial on May 17, 2007. After acknowledging the trial date on March 27, 2007, Grubowski objected to the trial date. During a status hearing on April 11, 2007, the trial court overruled Grubowski's objection to the trial date. On April 25, 2007, Grubowski filed a Motion to Dismiss pursuant to Indiana Criminal Rule 4(c). The trial court heard and denied this motion on May 11, 2007. On the day of trial, on May 17, 2007, Grubowski indicated that he would petition for interlocutory appeal on the trial court's refusal to grant his motion to dismiss. The trial court vacated the trial date. Grubowski's petition for

certification for interlocutory appeal was filed on June 11, 2007, and denied by the trial court on August 27, 2007.

The next trial date, October 25, 2007, was vacated due to court congestion. A new trial date was set for January 24, 2008. On January 24, 2008, prior to the commencement of trial, Grubowski filed a second motion to dismiss pursuant to Indiana Criminal Rule 4(c), which was denied by the trial court. At the close of the evidence, the jury found Grubowski guilty as charged and the trial court sentenced him to a suspended sixty-day jail term.

Grubowski now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Grubowski contests the trial court's denial of his motion to dismiss pursuant to Indiana Criminal Rule 4(c). In essence, he asserts that although he never requested any continuances or caused a delay in bringing this cause to trial, the trial court nevertheless set the trial date outside the one-year speedy trial date.

The right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 12 of the Indiana Constitution. *Clark v. State*, 659 N.E.2d 548, 551 (Ind. 1995). This "fundamental principle of constitutional law" has long been zealously guarded by our courts. *Id.* To this end, the provisions of Indiana Criminal Rule 4 implement the defendant's speedy trial right. *Id.* Specifically, section (c) of the Rule provides:

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had

on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

It is well established in Indiana that the burden is upon the State, not the defendant, to bring a defendant to trial within one year. *Rust v. State*, 792 N.E.2d 616, 618 (Ind. Ct. App. 2003), *trans. denied*. Criminal Rule 4(c) relieves the State from that duty only for a delay caused by the defendant's own act or a continuance had on the defendant's own motion. *Id.* When a delay is chargeable to the defendant, the period fixed by the rule is extended by the period of that delay. *Id.* Determination of what amount of delay is attributable to a defendant's actions must be decided on a case by case basis. *Wagner v. State*, 474 N.E.2d 476, 487 (Ind. 1985).

Here, the one-year period of Criminal Rule 4(c) began to run when the State filed its Information on April 13, 2006. However, Grubowski failed to appear for his initial hearing in the City Court. Twenty days elapsed between the date of that hearing and the date that Grubowski's first counsel entered his appearance. This delay is attributable to Grubowski. Then, after a trial date was set for July 31, 2006, Grubowski's current counsel filed his appearance together with a demand for jury trial. Because of this jury demand, the case had to be transferred to the trial court. The seven days that elapsed between the filing of the jury demand and the docketing

of the cause by the trial court are the result of Grubowski's actions and thus attributable to him.

Although Grubowski failed to appear for a pre-trial conference on August 11, 2006, the trial court later found that counsel had not received notice of this pre-trial conference. Next, on February 6, 2007, the State filed a motion requesting the trial court to set a trial date within the boundaries of Criminal Rule 4(c). Because Grubowski had not received notice of the pre-trial conference, we do not attribute the delay between August 11, 2006, and February 6, 2007, to Grubowski.

On February 15, 2007, the trial court set the trial for May 17, 2007. Even adding the twenty-seven days of delay attributed to Grubowski to the original end of the speedy trial date on April 13, 2007, the trial setting still falls outside Criminal Rule 4(c)'s time period. When a trial court, acting within the one-year period of the rule, schedules trial to begin beyond the one-year limit, the defendant must make a timely objection to the trial date or waive his right to a speedy trial. *Vermillion v. State*, 719 N.E.2d 1201, 1204 (Ind. 1999), *reh'g denied*. Here, Grubowski objected to the belated trial date on March 27, 2007. The trial court subsequently overruled Grubowski's objection during the status hearing on April 11, 2007. While we recognize that Grubowski initially acknowledged the trial date on March 19, 2007, and did not file his objection until March 27, 2007, Grubowski still made a timely objection. Because the one-year period did not expire until May 10, 2007, the trial court could yet have granted him a trial within the proper period. *See Little v. State*,

415 N.E.2d 44, 46 (Ind. 1982) (“If the defendant sits idly by a time when the court could yet grant him a trial within the proper period and permits the court, without objection, to set a date beyond that period, he will have deemed to have acquiesced therein.”). Also, the record does not contain any references to court congestion or emergency, nor does the chronological case history provide us with any insight as to why the case was set outside the mandates of Criminal Rule 4(c). As a result, we conclude that the trial court violated Grubowski’s rights under Indiana Criminal Rule 4(c).

CONCLUSION

Based on the foregoing, we conclude that the trial court improperly denied Grubowski’s motion to dismiss pursuant to Indiana Criminal Rule 4(c).

Reversed.

BAILEY, J., and BRADFORD, J., concur.